

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF(PJC)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANTS' JOINT MOTION IN  
LIMINE TO PRECLUDE PLAINTIFFS [sic] FROM REFERRING TO OR  
IDENTIFYING POULTRY OPERATIONS IN THE ILLINOIS RIVER WATERSHED  
AS CONCENTRATED ANIMAL FEEDING OPERATIONS OR 'CAFOS'" [DKT #2404]**

Plaintiff, the State of Oklahoma ("the State"), respectfully requests that the Court deny "Defendants' Joint Motion *in Limine* to Preclude Plaintiffs [sic] from Referring to or Identifying Poultry Operations in the Illinois River Watershed as Concentrated Animal Feeding Operations or 'CAFOS'" [DKT #2404] for the reasons that follow.

**I. Defendants' Fed. R. Evid. 402 Objection**

First, Defendants raise an objection to use of the term "concentrated animal feeding operations" on Fed. R. Evid. 402 grounds. Defendants argue that because the State has dismissed its claim based upon violations of the Oklahoma Concentrated Animal Feeding Operations Act (Count 9), all use of the term "concentrated animal feeding operations" in these proceedings is irrelevant.<sup>1</sup> Defendants are wrong.

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<sup>1</sup> Notwithstanding their requested relief, at page 4 of their Motion, Defendants assert that they should be permitted to make reference to a provision in the Oklahoma Concentrated Animal Feeding Operations Act ("CAFO Act"), which provides that "any animal feeding operation *may* be designated [by the State Board of Agriculture] as a concentrated animal feeding operation if it is determined to be a significant contributor of pollution to the waters of the state." *See* 2 Okla. Stat. § 20-44(C)(1) (emphasis added). If anything, such reference to the CAFO Act by Defendants will cause confusion, because nothing in the language of this provision *requires* that

At the outset, however, the State wants to be clear. Given its dismissal of Count 9, the State has no intention of offering evidence or arguing (1) that any given poultry operation in the Illinois River Watershed ("IRW") falls within the statutory definition of a Concentrated Animal Feeding Operation as that term is defined in the CAFO Act,<sup>2</sup> or (2) that any such operation is regulated under the terms of the CAFO Act. Nor does the State intend to refer to any poultry operation in the IRW as a "Concentrated Animal Feeding Operation" as that term is defined in the CAFO Act. However, referring to poultry operations in the IRW as "concentrated animal feeding operations" in the generic sense, and without any reference to the Oklahoma Concentrated Animal Feeding Operations Act and its technical definition, is a perfectly relevant description.

The fact of the matter is that poultry operations in the IRW involve concentrating large flocks of birds in poultry houses for the purpose of growing those birds to a desired weight range. A modern poultry house is, on average, populated by a flock of between 20,000 and 25,000 birds, and between five and six flocks generally pass through a house annually. *See* DKT #2076-3 (Fisher P.I. Test., p. 409). There are approximately 1,917 active poultry houses in the IRW. *See* DKT #2076-2 (Fisher 9/3/08 Depo., p. 143). The IRW contains some of the most concentrated poultry feeding activity in the country. *See, e.g.,* DKT #2076-4. Referring to such operations as "concentrated animal feeding operations" in a generic sense -- as opposed to in a statutory definitional sense -- is an accurate description and characterization that should be permitted.

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animal feeding operations which are significant contributors of pollution but which fall outside the statutory definition of a "Concentrated Animal Feeding Operation" -- as is the case here -- must be designated as Concentrated Animal Feeding Operations under the CAFO Act.

<sup>2</sup> The term Concentrated Animal Feeding Operation is defined in 2 Okla. Stat. § 20-41(b)(11).

## **II. Defendants' Fed. R. Evid. 403 Objection**

Second, Defendants raise an objection to use of the term "concentrated animal feeding operations" on Fed. R. Evid. 403 grounds. Defendants first argue that because the State has dismissed Count 9, use of the term will confuse the trier of fact. Given, however, that the State has no intention of referring to the CAFO Act's statutory definition of Concentrated Animal Feeding Operations or asserting that any poultry operations in the IRW fall within that definition or otherwise are regulated by the CAFO Act, there are no grounds for confusion.

Defendants next argue that use of the term will be misleading and cause unfair prejudice because the term "invokes negative connotations and images of a farm or operation inconsistent with the actual nature of the majority of independent [sic] contract grower operations in the IRW." *See* Motion, p. 4. As explained above, however, the generic descriptor "concentrated animal feeding operation" is entirely accurate. In reality, by seeking to preclude the State's use of this term, it is Defendants who are seeking to mislead the trier of fact. The poultry operations at issue are not the pastoral farms of old. They are factory farms. By not being able to refer to these poultry operations as concentrated animal feeding operations, the State would be deprived of a useful and accurate descriptor, which would unfairly prejudice the State.

## **III. Conclusion**

WHEREFORE, in light of the foregoing, "Defendants' Joint Motion in Limine to Preclude Plaintiffs [sic] from Referring to or Identifying Poultry Operations in the Illinois River Watershed as Concentrated Animal Feeding Operations or 'CAFOs'" should be denied.

Respectfully Submitted,

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